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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MOREY and SHARZAD SETAREH.	
MOREY SETAREH, Respondent, v. SHARZAD SETAREH, Appellant.	D055302 (Super. Ct. No. D493280)

APPEAL from a judgment of the Superior Court of San Diego County, Gonzalo P. Curiel, Judge. Affirmed.

In this marital dissolution proceeding, appellant Sharzad Setareh (Sharzad) agreed to pay respondent Morey Setareh (Morey) $202,000 from the 401(k)[1] retirement account maintained on her behalf by her employer. The payment was an "equalizing" payment

1 See 26 United States Code section 401(k).

which offset Sharzad's receipt of the remainder of the community's interest in the 401(k) account. The parties' agreement was made part of a dissolution judgment which was entered in June 2007.

Because of a disagreement between the parties with respect to the mechanism by which the payment would be made from the 401(k) and delay in utilizing the mechanism ultimately ordered by the family court, payment was not be made before the October 2008 financial crisis substantially reduced the value of Sharzad's 401(k) account. Thereafter Sharzad moved for relief from her payment obligation on the grounds Morey had not fully cooperated in accepting the payment. The family court found that Morey was not responsible for the delay and denied the motion. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Morey petitioned for dissolution of the parties' 10-year marriage on October 24, 2005. On November 9, 2006, the parties participated in a mandatory settlement conference during which they reached an agreement with respect to the division of certain assets. Among those assets was Sharzad's 401(k).

The parties agreed Sharzad would receive the first $45,000 of her 401(k) as her sole and separate property because she earned that portion before marriage. Sharzad agreed to pay Morey an equalization payment in the amount of $202,000 from the balance of her 401(k). The parties agreed to retain the services of George McCauslan to prepare a qualified domestic relation order (QDRO) in order to execute payment, and to divide all QDRO preparation costs equally. On June 7, 2007, the parties' agreement was incorporated into a stipulated judgment of dissolution.

On July 10, 2007, Morey sent a letter to Sharzad seeking to establish the QDRO. At or around this time, Sharzad's employer informed her of a service it offered by which it could the transfer of funds to a 401(k) established for Morey at no cost. In response to Morey's letter, Sharzad asked Morey to consent to this alternative lower cost method of payment.

Morey declined the alternative suggested by Sharzad's employer and asked for Sharzad's cooperation in setting up the QDRO. Between July 2007 and January 2008, counsel for Morey and counsel for Sharzad continued corresponding with one another regarding the transfer. Morey demanded Sharzad's cooperation in establishing the QDRO and Sharzad requested his consent to utilize the alternative offered by her employer. At the end of this exchange, a QDRO had not been established and Sharzad did not get Morey's consent to the alternate method of her employer's transfer and no payment was made.

On January 31, 2008, Morey filed an order to show cause (OSC) in which, among other matters, he asked the family court to set a timetable for establishment of the QDRO and payment of the amount owed. The family court heard Morey's OSC in June 2008 and ordered that payment take place within 14 days of its order and in addition ordered that Sharzad pay Morey interest on the amount due at the legal rate from October 15, 2007. The record indicates that at the June 2008 hearing Morey provided Sharzad with the information she needed to establish the QDRO and make payment to Morey.

On August 7, 2008, the parties executed an QDRO in accordance with the trial court's order and delivered it to Sharzad's employer. The transfer was subject to a 45-day

grace period during which either party could rescind the transfer. Although the parties were permitted to waive the grace period and permit an immediate transfer, Sharzad elected not to waive the grace period. Thus under the terms of the QDRO, the funds were scheduled to be transferred to Morey on October 27, 2008.

Sometime after August 7, 2008, the date the QDRO was executed, and before the date of October 20, 2008, the stock market and the value of Sharzad's 401(k) declined sharply. At some point shortly after the market decline, Sharzad exercised her right to prevent the transfer from her 401(k). On October 20, 2008, Sharzad filed an OSC in which she asked to revise the stipulated judgment to calculate the payment she owed Morey based not on the fixed amount set forth in the parties' agreement but as a percentage of the value of the 401(k) after the market decline.

Thereafter the family court heard Sharzad's OSC and denied her request to modify the stipulated judgment. The court found the parties' agreement expressly provided Morey a fixed amount rather than a percentage of Sharzad's 401(k). The family court found Morey had not been at fault with respect to effecting the transfer. Rather, the court found that from the middle of 2007 Morey's attorney made repeated requests for the transfer and that the court had previously awarded Morey interest on the amount owed because of Sharzad's failure to act expeditiously. The court further found that Sharzad had admitted that in June 2008 she had received from Morey the information needed to start the transfer process and nonetheless still failed to act expeditiously. In particular, the family court rejected Sharzad's argument Morey had intentionally delayed receiving money owed to him.

Sharzad filed a timely notice of appeal from the order denying her OSC.

DISCUSSION

I

Family Code[2] Section 2120 et seq.

Although not raised below, we agree with Morey that Sharzad's request for modification of the dissolution judgment was governed by Family Code section 2120 et seq.

Traditionally, motions for relief from a family law judgment were governed by Code of Civil Procedure section 473 when brought within six months after entry of judgment. (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32 (*Heggie*).) Thus, the trial court had the power, upon any just terms, to relieve a party from a judgment taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. (Code Civ. Proc., § 473, (subd. (b).) After six months had passed, however, an otherwise valid and final judgment could be set aside only if it had been obtained through extrinsic fraud. (*Heggie*, *supra*, 99 Cal.App.4th at p. 32.) The law governing the circumstances under which a judgment could be set aside after six months became the subject of considerable confusion and led to increased litigation and unpredictable and inconsistent decisions. (§ 2120, subd. (d); *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.) Accordingly, in 1993, the Legislature undertook to clarify this area of family law

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2 All further statutory references are to the Family Code unless otherwise specified.

by enacting sections 2120 through 2129, the "Relief from Judgment" chapter (§ 2120 et seq.). (See *Heggie, supra,* 99 Cal.App.4th at p. 32.)

In adopting section 2120 et seq., the Legislature sought to balance "[t]he public policy of assuring finality of judgments" with "the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct." (See § 2120, subd. (c).) To achieve this goal, the statute placed strict limits on a litigant's ability to obtain relief from marital judgments.

"Section 2122 sets out the exclusive grounds and time limits for an action or motion to set aside a marital dissolution judgment." (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684 (*Rosevear*).) The limiting nature of section 2122 is set forth in section 2121, subdivision (a), which provides: "In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter." (See *Heggie, supra*, 99 Cal.App.4th at p. 32 [after six months, the litigant is limited to the grounds specified in section 2122].)

II

Standard of Review

We review the trial court's decision on the motion to set aside the dissolution judgment for abuse of discretion. (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346; *Rosevear, supra*, 65 Cal.App.4th at p. 682.) Sharzad, as

appellant, has the burden of affirmatively showing error. On appeal, we are not authorized to substitute our judgment for that of the trial court. (*Rosevear, supra*, 65 Cal.App.4th at p. 682.) Even when two or more inferences can reasonably be deduced from the facts appearing in the record, we will not disturb the trial court's exercise of discretion absent a clear showing of abuse, resulting in injury to the appellant amounting to a miscarriage of justice. (*Ibid*.)

To the extent the trial court makes factual findings while ruling on a motion to set aside a judgment under section 2120 et seq., we review such findings for substantial evidence. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Under that standard of review, "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment. [Citations.] [¶] . . . Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

If " 'substantial' evidence is present, no matter how slight it may appear in comparison with contradictory evidence, the judgment must be upheld. . . . In short, even

if the judgment of the trial court is against the weight of the evidence, we are bound to uphold it so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial,' that is of ' "ponderable legal significance," ' ' "reasonable in nature, credible, and of solid value . . . ." ' [Citations.]" (*Howard v. Owens Corning, supra*, 72 Cal.App.4th at p. 631.)

Because Sharzad did not request a statement of decision, we imply all factual findings necessary to support the judgment if the record shows substantial evidence to support them. (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549, fn. 11.)

III

Timeliness

With respect to each of the five grounds enumerated in section 2122, the statute sets forth a separate time in which a motion or action must be brought.[3] Section 2122,

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3 The five grounds for setting aside a family law judgment provided by section 2122 and their respective time limits are: "(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

"(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury.

"(c) Duress. An action or motion based upon duress shall be brought within two years after the date of entry of judgment.

"(d) Mental incapacity. An action or motion based on mental incapacity shall be brought within two years after the date of entry of judgment.

"(e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake

subdivision (e), permits a court to set aside a stipulated or uncontested judgment where the parties show "mistake, either mutual or unilateral, whether mistake of law or fact." However, an action or motion based on mistake must be "brought within one year after the date of entry of judgment." (*Ibid*.) As Morey points out, mistake was the only plausible substantive ground on which Sharzad could have based her motion. There is nothing in the record which suggests that Sharzad was the victim of any fraud, duress, perjury, or failure to disclose which would have extended the time limit on her motion under the provisions of subdivisions (a), (b), (c), (d) or (f) of section 2122. Because Sharzad's motion was brought more than one year after the 2007 judgment, as a motion based on mistake, it was time-barred.

IV

Section 2123

Even if Sharzad's motion was timely, the family court was, in any event, required by section 2123 to deny it.

Section 2123 states: "Notwithstanding any other provision of this chapter, or any other law, a judgment may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become

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of fact. An action or motion based on mistake shall be brought within one year after the date of entry of judgment.

"(f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply."

inadequate." In *Heggie*, the court held that section 2123 "leaves a trial court with no discretion" to set aside a stipulated dissolution judgment when the sole basis for the motion is an unanticipated imbalance in asset distribution resulting from a "fluctuation in the stock market" after judgment. (*Heggie*, *supra*, 99 Cal.App.4th at pp. 32-34.) In *Heggie*, the court found that under section 2123 "where the only reason to set aside a judgment is that it was 'inequitable when made,' the trial court is affirmatively commanded *not* to set the judgment aside under 'any' law." (*Id.* at p. 33.)

In *Heggie*, the parties agreed the wife would receive a fixed amount from the husband's IRA account. After a judgment incorporating the agreement was entered, a significant increase in the market value of two stocks in the husband's IRA account caused an unanticipated imbalance in the value of the assets the parties received. (99 Cal.App.4th at p. 31.) The approximate three-week delay that allegedly allowed exposure to the stock market fluctuation was due to an oversight by the husband's attorney. (*Ibid*.) The family court provided relief from the judgment and the Court of Appeal reversed. In reversing the family court's order, the Court of Appeal pointed out "that the substance of the deal [was] important. The wife didn't bargain for X shares of stock. She bargained for the equivalent of a cash buyout, down to the last nine cents." (99 Cal.App.4th at p. 35.) The Court of Appeal further held the length of delay was insufficient alone for the trial court to set aside the judgment. (*Ibid.*) In particular, the court found there was no evidence of bad faith attributable to the husband. (*Id*. at pp. 34-36.) In a footnote the court expressly left open the question of whether bad faith would

support an order setting aside a stipulated judgment. (*Heggie, supra*, 99 Cal.App.4th, at p. 36, fn. 9.)

Heggie controls our disposition of the merits of Sharzad's claims. As the court in *Heggie* found, where, as here, market fluctuations caused unanticipated inequity and there is no bad faith on the party who benefited from the inequity, section 2123 bars relief from the dissolution judgment. (*Heggie, supra*, 99 Cal.App.4th at pp. 32-34.) In this regard we note that the record amply supports the family court's finding that Morey acted in good faith. Although more than 16 months passed between the time of judgment and the time Sharzad filed her motion, a delay substantially longer than one month as in *Heggie*, the record shows Morey had made attempts as early as one month after the time of judgment to enforce the judgment. The record further shows Morey attempted to enforce the judgment by way of an OSC filed on January 31, 2008.

Notwithstanding the requirements of section 2123, Sharzad asks that we recognize as nonstatutory grounds for setting aside a stipulated judgment a combination of bad faith and a subsequent imbalance in the division of property. We decline Sharzad's suggestion.

The first problem with her argument is that, as we have just noted, there is nothing in the record which would undermine the family court's finding Morey acted properly. Thus there is no basis upon which we could find that he acted in bad faith. More importantly however, where, as here, the record does not establish one of the five grounds set forth in section 2122, it may not be granted. (*Rosevear, supra*, 65 Cal.App.4th at p. 685.)

V

Sanctions

Morey argues Sharzad's appeal is frivolous and he is entitled to sanctions against her.

Code of Civil Procedure section 907 provides for sanctions against an appealing party when it appears "that the appeal was frivolous or taken solely for delay." (Code Civ. Proc., § 907.) An appeal may be frivolous if objectively speaking, "any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appeal is not frivolous if a reasonable attorney would think the issues are arguable. (See *id*. at p. 651.) In no cases except the clearest should an appeal be deemed frivolous. (*Ibid*.) An appeal simply without merit is not by definition frivolous. (*Ibid*.)

Sharzad's appeal was not "totally and completely without merit." (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650.) Sharzad cited legal authority in her attempt to provide support for the relief she was requesting. Sharzad's mistaken reliance on this legal authority does not render her appeal frivolous. (See *In re Marriage of Flaherty*, *supra*, 31 Cal.4th at p. 651 [sanctions should be "used most sparingly to deter only the most egregious conduct"].)

DISPOSITION

Sharzad's motion was untimely and in any event barred by section 2123. The order is affirmed. Morey's motion for sanctions is denied and he is awarded his costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.